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is that it overlooks the distinction between incompleteness and completeness induced by mistake. The revocation in this class of cases is not in any sense conditional. The mistake simply operates as the inducement to the complete act of revocation and does not prevent its coming into being.[14] Equity, however, might well relieve against such a revocation where to do so would more nearly carry out the intention of the testator.[15] There would, moreover, seem to be no valid practical objection to the setting aside of the revocation by the probate courts provided the equitable basis of their action were recognized.[16] As it is, they have frequently unconsciously done the work of equity,[17] but the failure to make the above distinction has resulted in many decisions which seem to do violence to the intention of the testator.[18]

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LIMITATIONS UPON THE SERVICE AND ENFORCEMENT OF SUBPŒNAS. — As a general rule, a subpœna may be taken out by any party to a suit without special leave of the court.[1] Originally defendants indicted for capital felonies were not included within this rule,[2] but by statutes they have generally been placed upon an equal footing with other parties.[3] The general rule is, however, subject to many limitations. Thus it is within the discretion of the court to refuse to allow an excessive number of witnesses to be summoned,[4] and where the defendant may subpœna witnesses at the state's expense, the courts generally require him to show that the desired witnesses will be able to give material evidence.[5] Moreover, the right to have subpœnas issued is broader than the right to compel attendance in obedience thereto. The right guaranteed by the Sixth Amendment and by various state statutes to have compulsory process for obtaining witnesses is limited to the right to have subpœnas served.[6] The theoretical basis for this view is that in the eighteenth century the practice of compelling attendance of witnesses by attachment was not well settled in England,[7] so that the right to have compulsory process, if strictly interpreted, then meant merely that the subpœnas should be served; and if they were not obeyed, the aggrieved party was left to his action for damages.[8] From a practical standpoint a subpœna may frequently be issued as a matter of course, whereas upon further information it would

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[14] *Cf.* Edmunds *v.* Merchants' Despatch, etc., Co., 135 Mass. 283.

[15] Onions *v.* Tyrer, 2 Vern. 742; Campbell *v.* French, 3 Ves. Jr. 321.

[16] *Cf.* in the law of sales where the courts in allowing the action of trover, Thurston *v.* Blanchard, 22 Pick. (Mass.) 18, or replevin, John V. Farwell Co. *v.* Hilton, 84 Fed. 293, against the fraudulent vendee of a chattel are really doing equitable work. The fraudulent vendee is a constructive trustee, and the allowance of the action is in essence nothing else than specific enforcement of his obligation to return the title wrongfully acquired by him.

[17] See Powell *v.* Powell, L. R. 1 P. & D. 209; Goods of McCabe, *supra.*

[18] The probate courts should face the question squarely, recognize that a revocation induced by mistake is not really conditional, and either refuse to do equitable work or disregard the revocation and revive the old will only where that result is clearly the intent of the testator.

[1] Raymond *v.* Tapson, 22 Ch. D. 430.

[2] See 2 Hawk. P. C., c. 46, § 165.

[3] See West *v.* Wisconsin, 1 Wis. 209.

[4] Butler *v.* State, 97 Ind. 378.

[5] Jenkins *v.* Florida, 31 Fla. 190. See State *v.* Graves, 13 Wash. 485.

[6] State *v.* Stewart, 117 La. 476.

[7] See Bowles *v.* Johnson, 1 W. Bl. 35.

[8] See argument of counsel in People *v.* Smith, 3 Wheeler Cr. Cas. (U. S. C. C.) 134 *et seq.*

not be proper to allow an attachment. Thus where a witness fails to attend, and gives as his excuse that he knows no evidence relevant to the issue or that the subpœna was had merely for vexatious purposes, the court upon being convinced of these facts may order the subpœna to be set aside.[9] Such was the decision very properly made in a recent English case where subpœnas were served upon the Prime Minister and the Home Secretary. *Rex* v. *Baines*, 25 T. L. R. 79 (Eng., K. B., Nov. 18, 1908).

The ministers did not attempt to rely upon their official position as a ground for not appearing, and it is apparently settled in England that dignity of office exempts no one except the King from the service of a subpœna.[10] Since the President of the United States, like the Prime Minister of England, is not above the law, the best view is that a subpœna may properly be served upon him.[11] *A fortiori*, subpœnas may be served upon members of the cabinet[12] and congressmen.[13] But although dignity of office does not prevent the service of subpœnas and cannot properly be set up as an excuse for disregarding them, yet official duties may be a sufficient excuse for not appearing in court.[14] How far the courts should attempt to enforce obedience to subpœnas in such cases is largely a question of expediency. It is generally better that high officials should give their undivided attention to affairs of state than that they should be forced to attend trials of comparatively little importance. When a subpœna *duces tecum* is served, the President, or even a governor, is justified in refusing to bring the desired papers into court, because he is necessarily the judge as to whether their contents ought to be kept secret;[15] for the court could not pass upon this question unless their contents were first disclosed. When only attendance *ad testificandum* is required, executive privilege is not as well established either in reason or in practice, but as a general rule the court should assume that the executive is acting properly and that his absence is due to his official duties or engagements rather than to contempt of court.[16]

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# RECENT CASES.

BANKRUPTCY — JURISDICTION OF FEDERAL COURTS — JURISDICTION OVER STATE RECEIVER. — A corporation was adjudged bankrupt on the ground that within four months a receiver had been appointed because of its insolvency, by a state court. On application by the trustee in bankruptcy the state court refused to direct its receiver to turn over to the trustee the property of the bankrupt. The trustee then applied to the bankruptcy court for a summary

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[9] *In re* Mundell, 52 L. J. Ch. 756. See also Dicas *v.* Lawson, 4 L. J. Exch. 80; Tinley *v.* Porter, 2 M. & W. 822; Steele *v.* Savory, 8 T. L. R. 94; Morgan *v.* Morgan, 16 Abb. Prac. (N. S.) 291.

[10] See Felkin *v.* Lord Herbert, 1 Dr. & Sm. 608; 1 Bl. Comm. ch. VII.

[11] See United States *v.* Burr, 25 Fed. Cas. 1.

[12] See People *v.* Smith, *supra*.

[13] Art. I, § 6 of the federal Constitution would prevent enforcement of a subpœna by attachment, while a congressman is in attendance at or going to or from a session of Congress. Respublica *v.* Duane, 4 Yeates (Pa.) 347; United States *v.* Thomas, 28 Fed. Cas. 79. But the tendency of the federal courts to give exemption even from the service of a subpœna during such time does not seem justified. See Miner *v.* Markham, 28 Fed. 387. *Contra*, Wilder *v.* Welsh, 1 McArthur (D. C.) 566.

[14] See Thompson *v.* German Valley Railroad Co., 22 N. J. Eq. 111.

[15] Thompson *v.* German Valley Railroad Co., *supra*.

[16] Appeal of Hartranft, 85 Pa. St. 433.